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THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1970, Chapter 318, as amended

IN THE MATTER OF the complaint made by Mr. Iberto Imberto of Toronto, Ontario, alleging discrimination in employment by Vic and Tony Coiffure and Vince and Tony Ruscica, 678 Kennedy Road, Scarborough, Ontario.

A HEARING BEFORE: Professor John D. McCamus
Appointed a Board of Inquiry into the above matter by the Minister of Labour, The Hon. Robert Elgie, to hear and decide the above-mentioned complaint.

Appearances:

Ms. J. Minor	Counsel for the Ontario Human Rights Commission and Mr. Iberto Imberto
Mr. E.A. Benevides	Counsel for Mr. Vince Ruscica

I

The Complaint brought before this Board of Inquiry by Mr. Imberto and the Ontario Human Rights Commission rests on an allegation that the respondents have refused to consider Mr. Imberto for employment in their hairdressing business for the exclusive reason that he is a male person. The Complaint (exhibit 2) alleges that the actions of the respondent in this respect amount to a contravention of section 4(1)(a) and 4(1)(b) of the Ontario Human Rights Code. Those sections provide, in part, as follows:

> 4. (1) No person shall, . . .
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> (a) refuse to refer or to recruit any person for employment;
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> (b) dismiss or refuse to employ or to continue to employ any person;
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> . . .
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place or origin of such person or employee.

These provisions of the Code represent a strong legislative commitment to the objective of eradicating the effect of discriminatory attitudes in the allocation of employment opportunities within the Province of Ontario. As the Code indicates in its preamble, ". . . it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry, or place of origin." In seeking to eliminate discrimination on the ground of sex in the employment context, the evident purpose of the Code is to ensure equality of opportunity and to

eliminate unjust barriers to employment based on biased attitudes towards the members of a particular sex or stereotyped attitudes toward the employment related capacities of the members of a particular sex.

Although it may well be that the principal concern leading to the enactment of measures against sexual discrimination in the employment context related to prejudicial attitudes restricting the employment opportunities of women in the labour market, it is evident that the Code in its terms is so designed as to protect members of the male sex from discriminatory employment practices as well. To deprive an individual of an employment opportunity simply for the reason that he is a member of the male sex would thus normally constitute an offence under the provisions of section 4 of the Code.

The Code further provides, however, that certain of the prohibited grounds of discrimination, sex included, may play a role in decisions relating to employment where the ground in question constitutes a legitimate qualification and requirement for the occupation question. Section 4(6) stipulates as follows:

> 4. (6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirement for the position or employment.

In the present case, it has been argued on behalf of the respondents that

the defence of bona fide occupational qualification has been established either on the basis of the attitudes of the customers of the respondents' business or because of the unwillingness of present employees of the respondents to continue employment with a male co-worker. The proper interpretation of section 4(6), therefore, has become a matter in issue before this Board of Inquiry.

II

The facts underlying the present complaint are not in substantial dispute between the parties. In February of 1979 an advertisement was placed in the Toronto Star by the respondents in the following terms:

> "HAIRDRESSER experienced, $175.00 to start,
> 267-9312 Scarboro."

Although the precise legal form in which the hairdressing business known as "Vic and Tony Coiffure" was not placed in evidence before this Board of Inquiry, Mr. Ruscica indicated in evidence that he and his wife were co-owners of the business (Transcript, P.85). The beauty salon operated as "Vic and Tony Coiffure" caters to a female clientele, and over recent years has had a staff of four to five hairdressers, including Mr. Ruscica's wife, Tony Ruscica. From the evidence led before this Board of Inquiry, it would appear that Mr. Ruscica performs the managerial functions associated with this business but spends very little of his time on the premises. Mr. Ruscica operates another business at a location a few doors away from the beauty salon. Mr. Ruscica's wife, however,

works full-time on the premises of the beauty salon as a hairdresser.

The complainant, Mr. Iberto Imberto, is an experienced hairdresser. Mr. Imberto was first apprenticed as a hairdresser in 1960 and has had a career of some twenty years working as a hairdresser in various beauty salons, primarily in Scarborough, Ontario. In 1965, Mr. Imberto opened his own salon in Scarborough and operated this business for approximately thirteen years. After selling this business in 1978, Mr. Imberto was hospitalized for medical treatment and after a period of recuperation and vacation, was ready to return to the labour market in January of 1979.

Mr. Imberto was interested to seek employment in a salon in the Scarborough area operated by someone else and accordingly, responded to the advertsement placed in the Toronto Star by Mr. Ruscica. The following account of what transpired in the course of Mr. Imberto's attempts to pursue this employment opportunity is not substantially challenged by the respondents:

> Q. . . . When you saw this ad, Mr. Imberto, what did you do?
>
> A. I phoned.
>
> Q. All right, and you phoned the number.
>
> A. Yes.
>
> Q. In the Ad?
>
> A. Yes. The person ---

Q. Yes? Who answered?

A. A girl answered and I asked to talk to the manager.

Q. All right.

A. The manager or owner. He came to the phone and said the firt time, "I am sorry, we need a girl" and I said, "Fine, thank you very much", and that was it. On the second week, the second time I phoned, I had the same person answering my questions and he again said, "I am sorry, we need a girl. We can't use you", and so on. So, I phoned again the third week and a girl at that time answered the phone and said, "I am sorry, we have already told you that we need a girl, not a man", and on the fourth, I don't remember if it was the fourth or fifth time I phoned since -- because the ad appeared every week.

Q. Yes?

A. I phoned again but by this time I was getting desperate because I needed money.

Q. Yes?

A. The gentleman I was talking to, I don't recall if it was Vic or Tony ---

Q. Did you ask for anyone when you phoned that time?

A. I asked for the manager or the owner and I was talking to the owner.

Q. All right.

A. He said he does not need a man, he needs a girl and I asked him if he knows about the Human Rights and he says he doesn't care it is his own business and he does what he wants.

Q. What did he do then?

A. Then, I advised him he cannot do that because there is a law that does not permit discrimination against me and at this point I asked him again if he wanted me to come up and try me out and see what I can do, since my experience has been based on 20 years.

Q. Yes?

A. He said the only reason he wanted me to come up to his place was for one simple reason, so he could give me something, as I recall.

The only serious disagreement between the complainant and the respondent is with respect to this latter incident. Mr. Imberto interpreted Mr. Ruscica's remarks on this occasion as being mildly threatening in some way. Mr. Ruscica insists that his remarks were misinterpreted. Mr. Ruscica's version of this exchange is that in response to Mr. Imberto's request that he be informed of the address of Mr. Ruscica's salon, Mr. Ruscica replied "Come over and pick it up" (Transcript, p.24). On either version of the facts, then, Mr. Ruscica's reply was, if not seriously intended as a threat, certainly rather abrupt and uncooperative.

Mr. Ruscica, in his testimony before this Board of Inquiry, conceded that Mr. Imberto's expressions of interest in the hairdressing job were rejected by him because he had determined to employ only female hairdressers. Mr. Ruscica indicated that this decision was taken in concert with his wife and offered what were, in effect, three reasons for adopting this employment policy. First, Mr. Ruscica testified that he had had an unfortunate experience with a male employee in the past and that for this reason he had resolved to never employ male hairdressers in the future. Secondly, Mr. Ruscica indicated that most if not all members of his staff did not wish to work with a male co-worker and would resign if a male applicant were given the job. Although it is not clear from Mr. Ruscica's evidence that he saw this as a separate ground justifying the policy of employing males only, the testimony of two employees of the respondents indicated that at least some of the current clientele of the hairdressing studio would not feel comfortable having their hair done by a man (Transcript, p.82). Counsel representing the respondents placed some reliance on this evidence of customer preference as providing

a basis for invoking section 4(6) of the Code.

The incident involving a previous male employee of Mr. Ruscica was referred to by him somewhat obliquely on a number of occasions during his testimony before this Board. These references appear to confirm an account of this incident offered by Ms. Kim Bernhardt, a Human Rights Officer on the staff of the Ontario Human Rights Commission who testified with respect to conversations which she had with Mr. Ruscica in which he indicated the basis for his decision not to employ male hairdressers in the following terms:

> Q. What reason did he give to you?
>
> A. He gave a few. The major one as he expressed it, was an experience he had had in his salon with a male employee, he said approximately five or six years earlier to that point in which he and a customer on a separate occasion came upon this male employee and a female employee kissing in one of the back rooms and possibly smoking Marijuana. He also expressed the reasoning that he believed his customers would be suspicious of his having a male employee on the premises because they would presume that sexual relations would go on between the male and female employees. (Transcript, p.19)

Mr. Ruscica indicated in his evidence that the previous male employee had also been reluctant to carry out certain responsibilities associated with the job of hairdresser and that this constituted an additional reason for not wishing to hire male employees. This point is made in the following excerpt from Mr. Ruscica's testimony:

Q. You would agree with me, Mr. Ruscica, that a man can do the job as well as a woman?

A. He could do it, but he would need to be pushed, but a woman does not need to be told what to do.

Q. How would you know that Mr. Imberto would have to be pushed? He has his own salon now. He does know how to run the business.

A. Well, a man is not used to polishing furniture or sweeping the floor.

Q. What if Mr. Imberto had swept the floor? Did you ask him?

A. No, but I am sure because it happened to me five or six years ago, when I had the other man in there. He never wanted to sweep the floor.

Q. Mr. Ruscica you had a bad experience with one man once, right?

A. And I don't feel like having it again. (Transcript, pp.90-91)

Although Mr. Ruscica placed considerable emphasis in his testimony on the problems resulting to his business if he were to lose a number of his current employees, it was apparent from his testimony that he had reached an independent view that the hiring of a male employee would not be a sound idea. The following exchange occurred in a cross-examination of Mr. Ruscica:

Q. I suggest to you, Mr. Ruscica you could hire a man, especially a man who had his own clientele and you could replace anybody who quit and still keep up your business.

A. I prefer to sell it, not to run that way.

Q. As a matter of preference?

A. Right.

Q. So you just don't want a man there?

> A. No, I keep that beauty parlour as long as I can that way, but if there has to be a man working there I prefer to sell or just close the door, because as things are today it is very dangerous having a man and woman together working in the same place. (Transcript, p.93)

The two employees of the respondents who testified before this Board of Inquiry both indicated that they would resign if Mr. and Mrs. Ruscica hired a male co-worker for the beauty salon business. The first of these employees testified that she had worked as a hairdresser for twenty years and had never before worked with a male co-worker. She indicated that she preferred not to do so. She felt more comfortable working with women than men and further she would not feel comfortable asking a man to sweep the floor or do things around the salon. Further, she indicated that there was only one washroom on the premises of Vic and Tony Coiffure (Transcript p.64-66). This employee indicated that if a male co-worker was hired she would quit and take her clients, numbering some fifty or sixty, with her (Transcript, p.73). The other employee testified that she did not feel comfortable working with men and would quit her job if a male hairdresser was hired (Transcript, pp.76-77). This employee indicated that the presence of men sometimes makes her feel nervous and afraid (Transcript, pp.82-83). Mr. Ruscica testified that the other two female employees of the beauty salon had also indicated to him that they would resign if a male hairdresser was employed (Transcript, pp.86-87). There was thus considerable evidence led before this Board of Inquiry to the general effect that the present members of the staff of the beauty salon resisted the idea of employing a male hairdresser and that some of them, at least, felt so strongly on the issue that they would resign their positions.

Mr. Ruscica suggested that if all of his female employees quit he would be forced to close his business (Transcript, p.87).

The evidence led before this Board of Inquiry pertaining to the question of customer preferences is more ambiguous in nature. Although both employees who testified indicated, to some extent, that their customers had a preference for female hairdressers, it was not established in evidence that the same customers would object to the idea of a male hairdresser working in the same premises as the female hairdressers whom they patronize. Moreover, it was not established that there were signficant numbers of customers who could be said to be customers of "Vic and Tony Coiffure" rather than patrons of particular hairdressers and that such customers would be offended by the idea of a male hairdresser working on the premises.

For the foregoing reasons, then, Mr. Imberto's attempt to apply for the advertised position was rejected out of hand. Mr. Imberto continued to search for employment and ultimately determined that he would again open his own business. This he accomplished seven weeks after the date of filing the complaint with the Ontario Human Rights Commission with respect to the present matter. Accordingly, Mr. Imberto seeks compensation for the amount which he would have earned during the seven week period as an employee of Vic and Tony Coiffure, subject to a deduction of Three Hundred Dollars representing money which he earned on a part-time basis during that period. In addition, it has been argued on Mr. Imberto's behalf that the mental distress resulting from the treatment which he was accorded by Mr. and Mrs. Ruscica should

be compensated for by an award of an additional Two Hundred Dollars.

III

As has been indicated above, quite apart from concerns Mr. Ruscica had with respect to the possible loss of some or all of his female employees, Mr. Ruscica had formed what might be described as an independent opinion with respect to the desirability of male employees. Before turning to consider the potential relevance of the attitudes of Mr. Ruscica's female employees or the alleged attitudes of the customers of his business, it is necessary to consider the extent to which this independent attitude of Mr. Ruscica forms the basis for a finding that his conduct in refusing to consider an application from Mr. Imberto constitutes an offence under section 4 of the Code.

First of all, it should be emphasized that Mr. Ruscica refused to entertain any information from Mr. Imberto with respect to his qualifications or past experience. Mr. Ruscica refused to consider Mr. Imberto for the simple reason that he is a member of the male sex. To prejudge Mr. Imberto in this fashion constitutes a clear instance of discrimination on the ground of sex. The concept of "discrimination" has been described by an American judge in the following terms:

> "Discrimination" means the act of making a distinction in favour of or against a person or thing based on the group, class or category to which that person or thing belongs rather than on individual merit. (Courtney v. The National Cash Register (1970), 262 N.E. 2d 586)

Mr. Ruscica reached his discriminatory attitudes with respect to male hairdressers on the basis of the slenderest possible evidence - a previous unfortunate experience with a male employee. It is precisely this type of stereotyping or prejudgment of individuals which the Code attempts to eradicate under the provisions of section 4. Whatever difficulties Mr. Ruscica may have had with a previous employee, section 4 of the Code requires him to approach the prospect of appointing males in the future with an open mind and with a view to assessing fairly their credentials and qualifications. This Mr. Ruscica did not do in the present case.

It must be noted, however, that Mr. Ruscica's motive in refusing to entertain an application for employment from Mr. Imberto were somewhat mixed. In addition to his own reservations about employing males, it is his submission that he was confronted with the prospect of the failure of his business as a result of the attitudes of his existing employees. It is a reasonable interpretation of Mr. Ruscica's evidence, and I so hold, that Mr. Ruscica was indeed influenced by both of these considerations in adopting a policy of refusing to employ male hairdressers. Assuming, then, for the sake of argument, that a defence under section 4(6) may be available to Mr. Ruscica with respect to some aspects of his motivation for discrimination, the question which arises is whether the independent discriminatory attitudes which he had provide a basis for a finding of a contravention of the Code where this independent attitude may be said to not constitute the sole motivation underlying the decision to discriminate.

In this regard, it becomes necessary to determine the proper interpretation of the term "because" in section 4. Section 4(1) of the Code provides

that "no person shall . . . refuse to refer or to recruit any person for employment . . . because of . . . sex . . ." It must be considered, then, whether one of the elements of a contravention of section 4 must be that the individual was motivated solely or exclusively by the prohibited ground of discrimination. It is my view that the requirements of section 4 would be met in any case where the discriminatory attitude in question forms some part of the basis for the decision to refuse to extend an employment opportunity. What section 4 attempts to secure, I would suggest, are employment decisions based entirely on non-discriminatory factors. Thus, a contravention would occur, in my view, whether the discriminatory factor proved to be the main motivation, or an ancillary consideration or simply one of many reasons for the decision, regardless of the priority given to any of the other reasons.

Although there appeared to be no Canadian cases decided directly on this point, support for this view can be drawn from decisions of Canadian courts dealing with analogous provisions of the Canada Labour Code, R.S.C. 1970, c. L-1. Section 1 of the Labour Code provides as follows:

> 101 (3) No employer, and no person acting on behalf of employer, shall
>
> (a) refuse to employ or to continue to employ any person or otherwise discriminate against any person in regard to employment or any term or condition of employment <u>because</u> the person is a member of a trade union, ...(emphasis added)

The Court of Appeal of the Federal Court of Canada has held that this provision of the Code would be contravened if it were established that one

of the considerations leading an employer to refuse to employ an individual was that the latter was a member of a trade union. A similar view was taken by the Ontario Court of Appeal in R. v. Bushnell Communications Ltd. (1974), 1 O.R. (2d) 442 in interpreting another roughly analogous provision of the Canada Labour Code.

On this basis, it follows that the fact that Mr. Ruscica was motivated in part at least by his own views with respect to the undesirability of male employees constitutes a sufficient ground for holding that Mr. Ruscica's conduct in refusing to consider Mr. Imberto as an applicant for the advertised position amounts to a contravention of section 4 of the Ontario Human Rights Code.

IV

The evidence before this Board of Inquiry has established that at least two and possibly all of the current members of the staff of Vic and Tony Coiffure are opposed to the idea of working with a male co-worker and have threatened to terminate their employment if a decision to employ a male is taken by Mr. and Mrs. Ruscica. Mr. Ruscica has indicated in his testimony that he feels that if these threats were to be acted upon, he would be forced to close down his business. The question which must be considered, then, is whether employee attitudes of this kind provide a justification for an employer refusing to hire a member of the opposite sex.

It must first be noted that the attitudes of these employees appear

to have no basis other than an unwillingness to work with a male co-worker. The justification offered for this feeling by one of the employees was that male co-workers would not participate responsibility in such activities as cleaning up the premises. It must be said that this evidence is not completely convincing. The basis for this opinion appears to be the incident referred to by Mr. Ruscica as his unfortunate experience with a previous male employee. The evidence of Mr. Imberto, which I accept, is that he has always been a willing participant in such tasks and has not found that male co-workers with whom he has been associated have been reluctant to carry their fair share of burdens of this kind. A refusal to work with a male co-worker on this basis is simply an indefensible prejudgment or stereotyping of male employees which constitutes a discriminatory attitude.

A more plausible explanation for the unwillingness of these employees to work with a male co-worker, suggested in their evidence, is that they simply do not feel comfortable working with men. Again, although one cannot fail to be sensitive to the concerns of an individual who suffers from feelings of this kind, the adoption of such attitudes results in a prejudgment with respect to the characteristics of particular individuals simply on the basis of their sex. However understandable such attitudes might be when viewed in the context of the psychological history of a particular individual, the prejudgment of individuals on the basis of sex rather than on the basis of their individual characteristics amounts to discrimination on the basis of sex.

As the unwillingness or, indeed, refusal, of existing employees

to work with a male co-worker rests on attitudes which are properly characterized as discriminatory in the requisite sense, the issue which must be addressed is whether an employer can justify discriminatory employment policy on the basis that the discriminatory attitudes of existing employees make it a virtual necessity for the employer to adopt such a policy. It is my view that no such justification would be consistent with the provisions and basic objectives of the Ontario Human Rights Code. To permit employers to raise a defence of this kind would obviously perpetuate the very practices and policies which the Code is designed to bring to an end. Thus, for example, if an employer were to be permitted to refuse employment to members of a particular racial group because his existing employees disliked members of that group, the Code's objective of eliminating discriminatory barriers to the employment of the members of that racial group would be frustrated. Nor is it material, in my view, that a particular group of employees appear to be so committed to their biases that they will quit en masse and create a very difficult situation for their employers. To give effect to such a defence only where such attitudes were widespread and deeply held amongst employees would have the peculiar and quite undesirable effect of rewarding an unusually prejudiced work force by excusing their employer from the application of the provisions of the Code.

For the foregoing reasons, it is my view that the attitudes of co-workers cannot provide a basis for excusing discriminatory employment practices otherwise prohibited by the Code. It has been further suggested by counsel representing the respondents, however, that some room may be found for a justification on this basis within the meaning of section 4(6) of the Code which provides that the prohibitions relating to employment

discrimination based on "age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirement for the position or employment." It is argued, in effect, that where the existing work force holds discriminatory attitudes based on age, sex or marital status, requirements based on such discriminatory attitudes constitute a "bona fide occupational qualification and requirement." I am satisfied, however, that this is not a construction which this language can reasonably be asked to bear. Again, to interpret the code in such fashion as to perpetuate discriminatory attitudes of this kind would very substantially undermine the purposes which the Code is patently designed to serve. Moreover, the more obvious interpretation of this phrase, i.e. that it relates to types of employment where characteristics relating to age, sex or marital status bear some relationship to the individual's ability to perform the job in question, is one which is quite consistent with the overall scheme of the legislation.

It should be emphasized that section 4(6) permits the "bona fide occupational qualification" exception to operate only in the context of the prohibited grounds of age, sex or marital status. Thus, by inference, the Code indicates that it is not possible to argue that the other prohibited grounds of discrimination, race, creed, colour, nationality, ancestry or place of origin, could constitute bona fide qualifications for a particular position. The construction of section 4(6) contended for by the respondents would thus lead to the peculiar result that the attitudes of co-workers could not be taken into account in the context of race, creed or colour, for example, but could be taken into account in cases of sex discrimination. There is no reason to suggest that the

attitudes of co-workers is a problem of unusual dimensions in the context of the grounds of age, sex or marital status and it would be a perverse interpretation of the Code, in my view, to admit of their relevance in this context. Again, the most obvious interpretation of section 4(6) is that it pertains to situations in which an individual's age, sex or marital status has some bearing on his or her ability to perform the task in question. Although I am not aware of any case law either American or Canadian which considers the relevance of the attitudes of co-workers in this context, I note in passing that the U.S. Equal Employment Opportunity Commission has published interpretative guidelines relating to the interpretation of equivalent provisions of the American Civil Rights Act of 1964, 42 U.S.C.A. §2000E which indicate that the attitudes of co-workers or the employer would not warrant the application of the bona fide occupational qualification exception. See 29 C.F.R. §1604.2 (1978)

In summary, then, the unwillingness of members of the current work force to work with members of the opposite sex does not relieve the employer from complying with the prohibition against sex discrimination set forth in the Code. The objective of the Code is to establish work environments in which members of both sexes establish normal and harmonious working relationships. The Code requires both employers and employees to accommodate themselves to this philosophy of equality of opportunity. It is very much to be hoped, of course, that employers will respond sensitively to the psychological difficulties of individuals who may find this accommodation a difficult process. In such situations, employers may wish to draw upon the educational and counselling resources of the Ontario Human Rights Commission.

V

Finally, it has been argued on behalf of the respondents that the attitudes of the clientele of the hairdressing studio provide some basis for the adoption of a policy of employing only female hairdressers. Again, in this context, reliance was placed by counsel for the respondents on the bona fide occupational qualification exception of section 4(6) of the Code. Again, it is my view that the bona fide occupational qualification exception cannot reasonably be interpreted so as to excuse a discriminatory hiring policy which has been adopted for the purpose of accommodating simple bias or prejudice on the part of the customers of a particular business firm. My reasons for reaching this conclusion are similar to those advanced for the conclusion that no defence is available to the employer who protests that he is merely accommodating the discriminatory attitudes of co-workers. To permit the discriminatory attitudes of customers to provide a basis for granting an exception to the Code's prohibitions would very seriously undermine their effectiveness. One of the evident purposes of the legislation is to create an environment in which such attitudes will have no impact on the distribution of employment opportunities within the province. Similarly, to reach the conclusion that such attitudes can be taken into account with respect to age, sex or marital status, would constitute a perverse interpretation of section 4(6).

The relationship of customer preference to the bona fide occupational qualification exception is, however, a more subtle matter than that raised by the prejudices of co-workers. Thus, there is some American case law which suggests that customer preference may, in unusual circumstances, be a pertinent consideration. In particular, it has been argued on behalf

of the respondents that the decision of the United States Court of Appeals (5th Cir.) in Diaz v. Pan American World Airways Inc. (1971) 442 F 2d 385, offers support for the proposition that customer preference can be taken into account as a basis for imposing sex as an occupational qualification, at least in cases where the failure of the employer to do so would result in his inability to carry on business. It would be useful, then, to examine the Diaz case in some detail.

The plaintiff in the Diaz case was a male applicant for the position of flight cabin attendant with the defendant airline. The airline had adopted a policy of hiring only female employees for this position and attempted to defend this practice on the basis of a provision of the 1964 Civil Rights Act setting out a bona fide occupational qualification exception which is roughly analogous to that of section 4(6) of the Ontario Code. The American provision, set out in section 703(e) of the U.S. Act, permits the use of criteria based on "religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Although it may be noted that the phrasing of the American bona fide occupational qualification exception is not precisely identical to section 4(6), it is not my view that the restriction that the qualification be "reasonably necessary to the normal operation" signals a significant difference in its interpretation or purpose.

The defendant airline argued in the Diaz case that there were two possible grounds for supporting the application of the section 703(e) exception. First, evidence was led at trial to demonstrate that the

airline's hiring policy represented a judgment based on adequate evidence that the performance of female flight cabin attendants was superior in the sense that they were better able to perform such non-mechanical aspects of the job as "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations." Evidence, which the trial judge accepted, was also led at trial establishing that although it is true that some males are capable of performing with similar effectiveness, the most efficient criterion for identifying individuals who are likely to be successful in discharging these responsibilities is a female sex qualification.

Secondly, evidence was led at trial which established that the customers of the airline preferred female flight cabin attendants. The airline argued that these preferences were not based on stereotyped attitudes or bias but rather reflected customer recognition of the superior abilities of female attendants with respect to the non-mechanical aspects of the job.

Although the bona fide occupational qualification defence succeeded at trial, the Court of Appeals reversed this decision and held that neither of the above grounds warranted its application. With respect to the first ground - the suggestion that females perform the required tasks more effectively - the Court of Appeals reasoned that although this might be true, the performance of the "non-mechanical tasks" of flight cabin attendants were not essential features of the service rendered by the

airline and thus it was not reasonably necessary for the airline to maximize its performance in this respect by discriminating against males. The Court suggested that such discrimination might be warranted where it was reasonable to believe that all or substantially all male applicants could not perform adequately but that this had not been established in the present case. If, as in the Diaz case, it was evident that some males could perform adequately, it was the Court's opinion that the only circumstance that would warrant the use of sex as the criterion for employment would be if it could be shown that: (1) it was impracticable to develop a screening device that would identify males who possess the abilities that most women possess and (2) that these abilities are necessary to the carrying out of an essential feature of the business of an airline and not merely, as in the present case, something tangential to them.

The Court also gave rather short shrift to the suggestion that customer preferences could be taken into account. Relying on guidelines to this effect of the Equal Employment Opportunity Commission, the Court held that the fact that the passengers of the airline prefer female stewardesses would not be a material consideration. With respect to the airline's argument that customer preference was not based on "stereotype thinking" but rather on an informed assessment of the superior capacities of female stewardesses to perform the "non-mechanical aspects" of the job, the Court held that any such argument could not avail an employer in circumstances where the responsibilities in question are, again, tangential to the business conducted by an airline.

The Court of Appeals in the Diaz decision thus does give some support to the idea that customer preference may play a role in determining

the limits of the bona fide occupational qualification exception. It must be emphasized, however, that the role envisaged for a customer preference is a narrowly restricted one. First, it was evidently the view of the Court of Appeals that the customer preference must be based on an informed judgment of the superior capacity of the members of one sex rather than the other with respect to the occupation in question. Without necessarily conceding that such superiority had been established in the Diaz case, the Court of Appeals reached its decision on the basis of the undisturbed finding of the trial judge that superiority had been demonstrated on the facts of that case. On the assumption that superiority was established, then, the Court of Appeals imposed further requirements which must be met before customer preference could be taken into account as a bona fide occupational qualification. First, the Court suggested that preference could be taken into account if it could be shown that all or substantially all men are inadequate with respect to the job performance in question. Alternatively, the customer preference could be taken into account if those men who were adequate in their performance of these aspects of the job could not be identified in a practicable manner and, further, if it could be shown that the performance of these tasks were an essential part of the business being carried on by the employer. In the Diaz case, the Court concluded that neither of these hurdles had been overcome by the defendant employer. Thus, the Court concluded in the following terms (at p.389):

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomolous if we were to allow the preferences and prejudices of the customers to determine whether the sex

> discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

The facts of the present case fall considerably short of the test set forth in the Diaz case. There was no suggestion in the evidence led by the respondents that customer preference for female hairdressers is based on a judgment of the capacities of males in general to perform hairdressing services. Nor, indeed, was there evidence led which would establish that the existing clientele of the respondents would discontinue their patronage if a male hairdresser were employed on the premises. It follows, then, that no basis has been established in the evidence before this Board of Inquiry which would warrant application of bona fide occupational qualification exception of Section 4(6) of the Code. Indeed, the evidence strongly suggests the contrary. The evidence of Mr. Imberto indicates that neither males in general nor Mr. Imberto in particular suffer inadequacies with respect to the occupation of hairdressing.

It is thus not necessary, in the present context, to reach a firm conclusion with respect to the applicability of the Diaz decision in the interpretation of Section 4(6) of the Ontario Code. The Diaz decision does indicate that there may be a range of situations in which customer preference may be a pertinent consideratio in the interpretation of Section 4(6) (see further, Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964 (1971) 84 Harvard Law Review 1109, at 1176-1186). Even if the reasoning in that case be accepted, however, there has been no basis established in the present case for taking such preferences into account.

VI

For the foregoing reasons, I have reached the conclusion that the refusal of the respondents to entertain an application for employment from the complainant amounts to a refusal to employ an individual on the basis of sex, within the meaning of section 4(1) of the Ontario Human Rights Code. Having decided that the respondents have contravened the Code, this Board of Inquiry is then empowered by the Code in Section 14c to make an order requiring the respondents to do any act or thing that will constitute full compliance with the offended provision and "to rectify any injury caused to any person or to make compensation therefor."

The complainant was evidently well qualified for the position for which he applied. No basis has been established by the respondents for believing that Mr. Imberto would not have been hired after an unbiased review of his qualifications.

The evidence of the complainant, which I accept, indicates that as a result of the respondents' refusal to employ him, he remained unemployed for a period of seven weeks, during which time he would have earned $1,225.00 at the rate of $175.00 per week advertised by the respondents. During that period, the complainant earned $300.00 through part-time employment and this figure should be deducted from the amount of the award.

The complainant has also sought relief in the form of compensation for frustation and mental distress resulting from the discriminatory action of the respondents. Although the law of contract damages has been somewhat reluctant in the past to award compensation for injuries of this kind resulting from breach of contract, there would appear to be no reason why injuries of this kind could not be the subject of compensation under the Ontario Human Rights Code. There is no reason to interpret the phrase

"any injury" in Section 14c(d) so as to exclude injuries to an individual's psychological well-being. Boards of Inquiry appointed under the Ontario Human Rights Code have made such orders in the past. See, for example, Kim McGuire v. Orchard Park Tavern, on July 13th, 1979 (Soberman); Copenace v. West, November 23rd, 1979 (Ratushny); Blake v. Loconte, March 12th, 1980 (Cumming) Cinkus v. Georgacopoulos, October 23rd, 1980 (Hunter) Shack v. London Drive-UR-Self Limited, June 7th, 1974 (Lederman) and Gabbidon v. Golas, July 9th, 1973 (Lederman). Further, it is of some interest to note that damages for psychological injuries have been awarded in a breach of contract cases dealing with employment contracts in recent years. See Cox v. Phillips Industries Limited, [1976] 3 All E.R. 161 (Q.B.); Pilon v. Peugeot Canada Ltd. (1980), 29 O.R. (2d) 711 (H.C.). In principle, I am satisfied that there is no impediment to the granting of such awards under section 14c of the Ontario Human Rights Code, provided that it is clearly established that such injuries have been occasioned by the conduct of the respondents.

In the present case, the evidence of the complainant is that his contacts with the respondent Vince Ruscica had occasioned considerable anger and frustration. Although I accept this evidence, I am not persuaded that the psychological injury thereby sustained was substantial in nature. Nonetheless, it is appropriate to make an award of some compensation for the distress caused by the conduct of Mr. Ruscica. In the circumstances of the present case, an award of $100. would be appropriate.

VII

ORDER

For the foregoing reasons, this Board of Inquiry makes the following orders:

1. It is ordered that the respondents pay the complainant Nine Hundred and Twenty-five Dollars ($925.00) as compensation for the loss of employment opportunity.

2. It is ordered that the respondents pay the complainant One Hundred Dollars ($100.00) as compensation for mental distress.

3. It is ordered that the personal respondents, Vince Ruscica and Tony Ruscica, send forthwith a letter of assurance to the Ontario Human Rights Commission undertaking to comply with the Ontario Human Rights Code in the future and to ensure that the business conducted under the name, Vic and Tony Coiffure, will be conducted in accordance with the requirements of the Ontario Human Rights Code.

Dated at Toronto this 6th Day of April, 1981.

John D. McCamus
Board of Inquiry